Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

BURLINGTON AIR EXPRESS, INC.,

Petitioner,

v.

LITE-ON PERIPHERALS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a suit by one who possesses a negotiable document of title that runs to the order of another person and has not been negotiated by indorsement, is it a federal-law or a state-law rule of decision that governs title to the goods?

2. If the state's rule of decision governs title to the goods described in a document of title, was there any basis for federal subject-matter jurisdiction?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Burlington Air Express, Inc. changed its name during the pendency of this litigation to BAX Global Inc. BAX Global Inc. is a wholly-owned subsidiary of The Pittston Company, a publicly-traded Virginia corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Burlington Air Express, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BE' OW

The court of appeals' opinion (per Trott, J., joined by Hug & W. Fletcher, JJ.) (Pet. App. 1-13) is reported at 255 F.3d 1189. The court of appeals' order directing the respondent to respond to Burlington's petition for rehearing and suggestion for rehearing en banc (Pet. App. at 22-23), and the court of appeals' subsequent order denying the petition for rehearing and suggestion for rehearing en banc (*id.* at 24-25) are not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on July 10, 2001, and denied rehearing and rehearing en banc on August 31, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns whether the federal courts may create federal common law to override uniform state laws that are embodied in state commercial-law statutes. The resulting questions of federalism and comity indicate consideration of the meaning and application of article I,

section 8 and the tenth amendment of the Constitution. If this action is not governed by federal common law, it is questionable whether the district court had power to decide the case under article III, section 2, clause 1 of the Constitution and whether it had subject-matter jurisdiction under 28 U.S.C. § 1337, the basis of jurisdiction asserted below, or under 28 U.S.C. § 1331, which was not asserted below. These constitutional and statutory provisions are reproduced in the Appendix at App. 26.

STATEMENT OF THE CASE

1. Petitioner Burlington is an international freight forwarder and ocean transportation intermediary based in Irvine, California. The services it provides include the transportation of goods for its customers in the United States. Petitioner provides transportation by several means, including by air in its own aircraft or via other air common carriers, and by sea via vessel-operating common carriers. Petitioner is licensed by the Federal Maritime Commission as an ocean transportation intermediary, and is subject to regulation by the Commission under the Shipping Act of 1984. *See* 46 U.S.C. app. § 1718.

2. Respondent is a California-based corporation engaged in the computer-hardware business, and is a wholly-owned subsidiary of Silitek Corporation, a Taiwan company.

3. This case concerns whether respondent had title to computer keyboards that were manufactured in Taiwan and sold F.O.B. Taiwan to petitioner's customer, Reveal Computer Products, Inc. Under a long-term rate

and service agreement with Reveal, petitioner collected the goods from the seller, Silitek Corporation, in Taiwan and transported them to Los Angeles. Based on information provided by Silitek, petitioner prepared a negotiable bill of lading that consigned the goods to the order of Reveal. After the goods arrived in California, Reveal asked petitioner to deliver half of the shipment. Petitioner delivered half of the goods to Reveal without requiring Reveal to surrender the negotiable bill of lading. As frequently happens, Reveal had not yet received the bill of lading from Silitek, to whom petitioner had given it upon picking up the goods in Taiwan. By delivering the goods without surrender of the original bill, petitioner ran the risk that Reveal might have negotiated (or would later negotiate) the bill to a third party, which would then, as a good-faith purchaser, be entitled to the goods. Reveal never negotiated the bill.

Respondent later emerged with the original bill of lading, and demanded that petitioner pay it for the value of the goods delivered to Reveal. Petitioner declined respondent's claim because Reveal, the order party, had not indorsed the bill; thus, under California's Uniform Commercial Code, respondent was not a "holder" of the bill, CAL. U. COM. CODE § 1201(20), and was not entitled under the document. *Id.* § 7403(4).

4. Claiming entitlement to and damages for the goods delivered to Reveal, respondent brought this action by filing a complaint in the district court, invoking the court's commerce-clause jurisdiction under 28 U.S.C. § 1337. Respondent claimed it had acquired title to the goods by means of an assignment of rights from the seller, Silitek. Respondent produced a letter in which Silitek assigned its rights against Reveal, and claimed

that this assigned the right to the goods under petitioner's bill of lading.

Respondent moved the district court for a summary judgment, claiming it was entitled to recover damages from petitioner under the Ninth Circuit's decision in *C-Art Ltd. v. Hong Kong Islands Line America*, 940 F.2d 530 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992).

Adopting respondents' proposed findings of fact and conclusions of law (Pet. App. 16-21), which made no reference to the California law governing documents of title, the district court found that, "[p]ursuant to the terms of said bill, the goods were 'consigned to order of' Reveal. . . . " Pet. App. at 17 ¶ 6. Despite the "order" language, the court did not address the fact that petitioner's bill of lading was a negotiable document of title, and did not discuss the legal significance of the fact that the document was made to the order of Reveal. Although the California Uniform Commercial Code expressly governs title under documents of title such as petitioner's bill of lading, the district court ignored the California statute and held that respondent was entitled to the goods under its letter of assignment from Silitek.

5. On petitioner's appeal, the Ninth Circuit affirmed the judgment for respondent. Although Judge William Fletcher, during oral argument, distinguished the bill of lading in *C-Art* as having been made to the order of the shipper, not – as here – to the order of the buyer, the Ninth Circuit cited *C-Art* and this Court's decision in *Pere Marquette Ry. v. J.F. French & Co.*, 254 U.S. 538, 546-47 (1921), for the rule that failure to require surrender of the indorsed bill of lading before delivery of the goods when the bill of lading so requires is actionable misconduct on

the carrier's part. *See Lite-On Peripherals, Inc. v. Burlington Air Express, Inc.*, 255 F.3d 1189, 1192 (9th Cir. 2001); Pet. App. at 5. Rejecting petitioner's assertion that the question of who is entitled to the goods under a negotiable bill of lading is controlled by California's Uniform Commercial Code, the Ninth Circuit proceeded to fashion a federal rule of decision, which it premised on *C-Art* and *Pere Marquette*. *See Lite-On*, 255 F.3d at 1192; Pet. App. at 5. Viewing these cases as an expression of controlling law, the Ninth Circuit declined to discuss the applicability of the California Uniform Commercial Code, and offered no reason why that state statute should be deemed preempted by the law expressed in these federal cases.

Drawing on *Pere Marquette* and *C-Art*, the Ninth Circuit held that respondent had a cause of action based on petitioner's "misdelivery" to Reveal. The court of appeals found a basis for this actionable claim in its conclusion that Silitek, the Taiwanese seller, was a party to petitioner's bill of lading, and could thus hold petitioner liable for delivering to Reveal. The court cited form language on the back of the bill which defined the term "Merchant," used throughout the bill, as including the "consignor," among others. The court held that Silitek, as the consignor, must be deemed a party to the bill, citing for support its holding in *All Pacific Trading, Inc. v. Vessel M/V HANJIN YOSU*, 7 F.3d 1427, 1431-32 (9th Cir. 1993), *cert. denied sub nom. Hanjin Container Lines, Inc. v. Tokio Fire & Marine Ins. Co.*, 510 U.S. 1194 (1994). *See Lite-On*, 255 F.3d at 1193-94; Pet. App. at 8-9. The Ninth Circuit theorized that Silitek was a party to the bill of lading, even though *Reveal* had contracted with petitioner to transport the goods from Taiwan – *cf. Thunderbird Motor Freight Lines, Inc. v. Seaman Timber Co.*, 734 F.2d 630, 632

(11th Cir. 1984) (consignee, not consignor, was shipper). Based on its theory that Silitek was the contracting party, the Ninth Circuit held that repondent, as Silitek's assignee, was entitled to demand the goods, and to recover damages from petitioner for delivering them to Reveal. *See Lite-On*, 255 F.3d at 1193-94; Pet. App. at 7-10.

The court of appeals adopted respondent's argument that it had not been Silitek's intention to have the goods delivered to Reveal prior to receiving Reveal's payment for the goods:

> The idea that Silitek would send Reveal goods for which it had not been paid, with no guarantee that it would receive payment, simply does not hold water. Until Silitek obtained payment, its interests depended on Burlington's performance of its promise to deliver the goods only upon surrender of the bill of lading. Thus, we reject Burlington's claim that Silitek was a stranger to the shipping contract.

Id. at 1194; Pet. App. at 10.

The Ninth Circuit did not account for the fact that Silitek, the seller, had instructed petitioner to consign the goods to the order of Reveal. In fact, the court of appeals concluded that the bill's "order" language was irrelevant: "[I]t does not matter that Lite-On was not a holder in due course of a bill of lading that had been endorsed by Reveal. . . . " *Id.* at 1195; Pet. App. at 11.

6. Petitioner filed a timely petition for rehearing with suggestion for rehearing en banc. The petition pointed out that the panel's decision had fashioned federal common law to determine whether respondent had an actionable claim under a document of title that was

subject to state law. Urging reconsideration, the petition cited this Court's admonition, in *Erie R. Co. v. Tompkins*, 364 U.S. 68 (1938), that the federal courts may not create federal common law to override state law unless the state law has been preempted by Congress. *Id.* at 78-80.

The panel acted on the petition for rehearing by ordering respondent to submit a response. The panel's order admonished counsel for both parties to be mindful of "the importance of this matter to the transportation industry. . . . " *See* Pet. App. at 22-23.

After respondent filed its response to the petition, the Ninth Circuit issued an order denying the petition for rehearing and the suggestion for rehearing en banc. *See* Pet. App. at 24-25.

7. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

This petition should be granted for two reasons. *First*, the Ninth Circuit's judgment, as a practical matter, creates a federal rule of decision for determining title to property covered by a negotiable document of title. Heretofore, such determinations have been exclusively within the province of each state's law; all fifty states have enacted uniform rules for rights to property under documents of title, and Congress has not seen fit to occupy the field, under the dormant commerce clause or any other constitutional pretext. Whether Congress has declined to act because it has viewed title to property as not a federal concern, or because the enactment of a uniform law for documents of title by all fifty states has satisfied the need

for a national law on the subject, the field has never been preempted, and issues of title are governed solely by state law. By creating a federal rule for determining entitlement to goods under a negotiable bill of lading, the Ninth Circuit below ignored the basic principles of federalism and comity, and rendered a decision that conflicts with this Court's holding in *Erie* – which prohibits federal courts from creating federal common law to resolve commercial disputes. The question of entitlement under a document of title is answered specifically by Article 7 of the Uniform Commercial Code, which has been adopted with little, if any, variation by all fifty states. Under this Court's holding in *Erie*, the Ninth Circuit was not authorized to supplant this uniform state commercial law with a contrary federal common-law rule.

Second, if the Ninth Circuit's holding that federal common law governs this action was in error, there would appear to be no basis for subject-matter jurisdiction, and the judgment should be vacated.

I. The Decision Below Creates a Federal Rule That Displaces the Controlling State Statute.

A. There is no federal statute that governs title to goods.

Title to goods, as in cases of title to any private property, is a subject of state, and not of federal, law. In this case, title to goods covered by a negotiable bill of lading is governed by the California Uniform Commercial Code.

Although petitioner's bill of lading was subject to the provisions of the Carriage of Goods by Sea Act, 46 U.S.C.

app. §§ 1300-1315 ("COGSA"), the act applied, by its own terms, only from the time the goods were loaded on until the time they were discharged from the ship. *See id.* § 1301(e). The goods were discharged from the ship on February 2, 1996, and were delivered to Reveal on February 6, 1996, four days after COGSA ceased to apply.

No other federal statute applied to the goods or the bill of lading. The Federal Bills of Lading Act (or Pomerene Act), 49 U.S.C. §§ 80101-80116, does not apply (as COGSA does) to bills of lading issued in a foreign country for the delivery of goods to the United States. *See id.* § 80102. As petitioner's bill was issued in Taiwan, the Pomerene Act does not apply.

The district court cited the Carmack Amendment, 49 U.S.C. § 14706 (*see* Pet. App. at 17 ¶ 1). But the Carmack Amendment does not apply to any surface transportation in the United States under a bill of lading that includes ocean transportation from a foreign country. *See id.* § 13501. As petitioner's bill covered ocean transportation from Taiwan to Los Angeles, the Carmack Amendment does not apply.

Under the Shipping Act, the Federal Maritime Commission regulates ocean transportation intermediaries such as petitioner, but the Commission does not regulate in any area implicated by respondent's complaint below. The Commission has no jurisdiction to adjudicate the rights of various claimants to property such as the goods in this case. *See* Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1722 *passim*.

In sum, no federal statute regulates title to the computer keyboards covered by petitioner's bill of lading.

B. In every state, title to goods is governed by the state's enactment of the Uniform Commercial Code.

The state-law rules for determining who has title to goods under a negotiable bill of lading such as petitioner's are straightforward and uniform. All fifty states have enacted Article 7 of the Uniform Commercial Code. Article 7 covers documents of title. The rubric "documents of title" includes bills of lading. *See* CAL. COM. CODE § 1201(6); U.C.C. § 1-201(6). A bill of lading may be negotiable or nonnegotiable. If negotiable, it reflects the carrier's agreement to deliver the goods described in the bill to the "order" of some person. The bill may identify the person whose order will be honored, or may simply state "to order," which makes it bearer paper. *See* CAL. U. COM. CODE § 7104(1)(a); U.C.C. § 7-104(1)(a).

Only the "holder" of a negotiable bill of lading may claim title to the goods covered by the document. Article 1 defines the holder as "the person in possession if the goods are deliverable to bearer or to the order of the person in possession." CAL. U. COM. CODE § 1201(20); U.C.C. § 1-201(20).

The code provides that "[a] negotiable document of title running to the order of a named person is negotiated by his indorsement and delivery. After his indorsement in blank or to bearer any person can negotiate it by delivery alone." CAL. U. COM. CODE § 7501(1); U.C.C. § 7-501(1). The law requires a bailee or carrier such as petitioner to deliver the goods only to "a person entitled under the document. . . . " CAL. U. COM. CODE § 7403(1); U.C.C. § 7-403(1).

In this case, respondent was the person in possession of the negotiable bill of lading, because Silitek, instead of sending the bill to Reveal, gave it to respondent. The Ninth Circuit affirmed the judgment for respondent based on what it perceived to be respondent's contractual rights under the bill. Had the Ninth Circuit applied sections 7403 and 7501 of California's Uniform Commercial Code, it would have been compelled to conclude that respondent was not entitled to the goods because, although respondent possessed the bill, the document ran to Reveal, not to respondent. Under California law – as under the law of all fifty states – respondent could not demand the goods or recover damages from petitioner because it was not the "**holder**" of petitioner's bill of lading,[1] and was not "a person entitled under the document. . . . " CAL. U. COM. CODE § 7403(1); U.C.C. § 7-403(1). The bill was made to the order of Reveal, and respondent had possession *without indorsement* by Reveal.

Federal courts have been called upon, in numerous diversity cases, to apply the relevant provisions of the forum state's enactment of the Uniform Commercial Code. But the Ninth Circuit declined to apply California's enactment of the U.C.C.'s document-of-title provisions in this nondiversity case. Without explaining why it believed California's commercial statute did not apply,

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[1] Only the "holder" of a negotiable bill may enforce the bill as a contract. *See, e.g.*, the Second Circuit's explanation that "the holders of a 'bill of lading, are in contractual relation with the carrier and entitled to enforce the contract.' " *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 47 F.2d 878, 879 (2d Cir.), *cert. denied*, 283 U.S. 856 (1931) (quoting *Higgins v. Anglo-Algerian S.S. Co.*, 248 F. 386, 387 (2d Cir. 1918)).

the Ninth Circuit fashioned a federal rule of decision, and held that respondent had an actionable claim against petitioner under the bill of lading even though it was not a holder because the bill had not been indorsed by Reveal. *See Lite-On, supra,* 255 F.3d at 1195; Pet. App. at 11.

By adopting Article 7 of the Uniform Commercial Code and the definitions in Article 1, the states have adopted uniform rules for determining who is "entitled" under a document of title. Under California's Uniform Commercial Code, as petitioner argued, respondent was not entitled under the document because the document – petitioner's bill of lading – was made to the order of Reveal, not to the order of respondent, and because Reveal had not indorsed the document. *See* CAL. U. COM. CODE § 7501(1); U.C.C. § 7-501(1). Under the California statute and its analogue in each of the other states, title to the goods described in a negotiable bill of lading can be transferred to another person only if the party to whose order the bill is made indorses the document. Just as B cannot make presentment and demand payment of a negotiable instrument such as a check made to the order of A unless A has indorsed the instrument, so respondent could not demand delivery of goods under a document of title made to the order of Reveal unless Reveal had indorsed the document.

C. The Ninth Circuit displaced the California Uniform Commercial Code with a federal rule of decision.

Although petitioner's briefing explained the application of the California Uniform Commercial Code, the Ninth Circuit refused to apply it. The Ninth Circuit also declined to explain why it would not apply California law. Without comment it rejected the applicable state law and created a federal rule of decision, which is based on this Court's decision in *Pere Marquette, supra,* 254 U.S. 538, the Ninth Circuit's decisions in *C-Art, supra,* 940 F.2d 530, and *All Pacific, supra,* 7 F.3d 1427, and the Second Circuit's opinion in *Allied Chemical Int'l Corp. v. Companhia de Navegacao Lloyd Brasiliero,* 775 F.2d 476 (2d Cir. 1985), *cert. denied,* 475 U.S. 1099 (1986). Notably, the Ninth Circuit offered no reason for creating a federal rule of decision to supplant the California statute governing documents of title.

The Ninth Circuit overlooked the fact that *Pere Marquette* dealt with an interstate bill of lading, which was governed by the provisions of the Pomerene Act, and which was issued by a rail carrier subject to the Interstate Commerce Act. That case, plainly, was within the commerce-clause jurisdiction of the Court. *See* 28 U.S.C. § 1337. As discussed above, the only statute applicable to delivery and title to the goods under petitioner's bill of lading is California's enactment of Article 7 of the Uniform Commercial Code.

This is not, as the Ninth Circuit perceived it, a case of delivering goods to someone other than the rightful

owner. This is a case, instead, of the Ninth Circuit refusing to acknowledge that Reveal had title to the goods and was the rightful owner under the applicable state law.

Reluctant to believe that Silitek would do what it did – deliver the goods to Reveal on credit terms – the Ninth Circuit did not follow its analysis of the F.O.B. Taiwan delivery term to its logical conclusion. If, as the court conceded, title to the goods transferred to Reveal when Silitek delivered them to petitioner, *see Lite-On*, *supra*, 255 F.3d at 1193; Pet. App. at 7, then petitioner was the bailee of *Reveal's* goods, not of Silitek's goods. Therefore, delivering the goods to *respondent* would have been a misdelivery, for respondent, as Silitek's assignee, had no more right to demand Reveal's goods than Silitek did. Had petitioner delivered to respondent, as the Ninth Circuit held it should have done, it would have been liable to Reveal for misdelivering Reveal's goods to a person who was not entitled to them under the document of title.

Under the federal rule of decision it fashioned, the Ninth Circuit thus reached the opposite result of the one required by the applicable state law – creating the possibility of thousands of future actions against carriers by persons who, though not entitled under the document of title, may hope to thwart the operation of state law by relying on the contrary federal rule announced in *Lite-On*.

D. The national uniformity achieved by the Uniform Commercial Code is vital to American commerce.

The Ninth Circuit's decision contradicts the basic provisions of the Uniform Commercial Code which govern rights under negotiable documents of title in all fifty states, making the decision one of exceptional importance.

The importance of negotiable documents cannot be overstated. According to Professor Edward Rubin of the University of Pennsylvania School of Law:

> Negotiability is one of the great legal concepts of the Western world, one that has been with us longer than democracy or human rights. It freed us from our atavistic dependence upon jewelry metal as our basic form of money, carried commerce across physical distances and political divides, and transformed banks from warehouses of valuables into financial intermediaries.

Edward L. Rubin, *Learning from Lord Mansfield: Toward a Transferability Law for Modern Commercial Practice*, 31 IDAHO L. REV. 775 (1995).

Commenting on the importance of negotiable bills of lading as documents of title, the Second Circuit observed:

> [A] negotiable or order bill of lading is a fundamental and vital pillar of international trade and commerce, indispensable to the conduct and financing of business involving the sale and transportation of goods between parties located at a distance from one another. It constitutes acknowledgment by a carrier that it has

> received the described goods for shipment. It is also a contract of carriage. As a document of title it controls the possession of the goods themselves. . . . It has been said that the bill and the goods become one and the same, with the goods being 'locked up in the bill.'

Berisford Metals Corp. v. S/S SALVADOR, 779 F.2d 841, 845 (2d Cir. 1985), *cert. denied*, 476 U.S. 1188 (1986) (citing *Allied Chemical, supra,* and quoting GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY 96 (2d ed. 1975)).

As the American economy became increasingly nationalized after the Civil War, the American Bar Association came to recognize the need for uniformity in the laws governing interstate commercial transactions. This growing awareness prompted the organization, in 1892, of the National Conference of Commissioners on Uniform State Laws, which drafted the Uniform Commercial Code and achieved its adoption by all the states. *See* remarks by Professor Fred H. Miller in Albert J. Rosenthal, moderator, *A Symposium on Film and the Law: Discussion: Uniform State Laws: A Discussion Focused on the Revision of the Uniform Commercial Code*, 22 OKLA. CITY U.L. REV. 257, 273 (1997).

Dean Emeritus Rosenthal of Columbia University School of Law offered this explanation of the importance of uniformity in commercial laws:

> Differences in law from state to state impose a particularly heavy toll on the efficiency of many kinds of commercial transactions, and with the steady expansion of markets over larger and larger areas the value of uniformity continues to

> grow. Since this value is especially great in the field of commercial law, it is not surprising that the greatest efforts and accomplishments of the uniform law process have been in that field. This has been true from the very beginning, starting with the Uniform Negotiable Instruments Law and the Uniform Sales Act, and it is truer than ever today with the tremendous importance of the Uniform Commercial Code, which is probably the most significant statutory construct in American legal history.

Introductory remarks by Dean Albert J. Rosenthal, *id.* at 258-59.

The Ninth Circuit's decision overlooks the applicable provisions of California's Uniform Commercial Code, and thereby creates a federal common-law rule that conflicts with the uniform rules adopted by all fifty states for determining who is entitled to goods under a negotiable bill of lading. By giving birth to a rule that negates the Uniform Commercial Code, the opinion promises to impair the effectiveness of negotiable documents of title and to cast doubt on the predictability of commercial transfers in one of "those fields where uniformity among the states is felt to be crucial for the operation of the national economy and no deviation can be tolerated. . . ." Remarks of Joanne Barker (Counsel to New York State Assembly Judiciary Committee), *id.* at 283-84.

Though the potential impact of the Ninth Circuit's decision cannot be precisely measured, statistics on containerized imported goods entering the United States through the nation's largest ports will give some sense of the pervasive effects this decision may have. In the year

2000, the Port of Long Beach handled 4,600,787 TEUs[2] holding goods valued at $98.2 billion.[3] If each of those container units carried goods covered by just one negotiable bill of lading, that would involve the transfer of title under some 4.6 million documents of title in this one port in a single year. The numbers for the adjacent Port of Los Angeles are smaller, but still impressive: In the ten months of January through October, 2001, Los Angeles received 2,232,868.20 TEUs.[4] This would project to about 2.7 million TEUs for the entire year, or another 2.7 million documents of title if we assume just one bill of lading per container unit. The Port Authority of New York and New Jersey reported handling more than one million containers in the first six months of 2000.[5]

Thus, in a given year, the ports of Long Beach, Los Angeles, and New York and New Jersey could, conservatively, receive goods covered by more than nine million documents of title like the bill of lading issued by petitioner here. By setting up a federal rule of decision that

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[2] A "TEU" is a "Twenty-foot-Equivalent Unit," the standard used in the transportation industry to measure the number of containers moving on a ship or through a port. *See, e.g., United States v. Federal Maritime Comm'n*, 210 U.S. App. D.C. 134, 655 F.2d 247, 249 n.6 (1980).

[3] *See* Port of Long Beach Annual Shipping Volume Page (visited Nov. 21, 2001) <http://www.polb.com/cv.htm>.

[4] *See* Port of Los Angeles 2001 Statistics (visited Nov. 21, 2001) <http://www.portoflosangeles.org/detailstatistic.asp?fiscal_year=2001>.

[5] *See Cargo Continues Strong Gains in Port of NY/NJ*, Oct. 17, 2000 (visited Nov. 21, 2001) <http://www.panynj.gov/pr/139-00.html>.

contradicts the state rules adopted in California, New York, New Jersey, and the other forty-seven states, the Ninth Circuit's decision creates the potential for a staggering number of title disputes.

Given the vital importance of national uniformity of *negotiable documents of title* – which patently is a state, and not a federal, concern – this petition for a writ certiorari should be granted to permit review of the Ninth Circuit's far-reaching decision.

E. The decision below conflicts with this Court's holding in *Erie*.

From a constitutional perspective, the Ninth Circuit's decision essentially returns to the rule this Court announced in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which held that the federal courts may declare uniform federal rules of decision for issues of general commercial law. In the vein of *Swift v. Tyson*, the Ninth Circuit has declared that the assignee of a seller under a negotiable bill of lading is entitled to the goods under federal case law, even though the assignee is not "entitled under the document" because it is not the person to whose order the negotiable bill was made and does not hold the bill by indorsement by the order party. This Court overruled *Swift v. Tyson* in 1938, declaring its doctrine of federal general commercial law unconstitutional. *See Erie, supra*, 304 U.S. at 78-80. The Ninth Circuit's decision contradicts *Erie* and returns to the unconstitutional rule of *Swift v. Tyson*.

In reaching its decision, the Ninth Circuit declined to apply state law, as reflected in the California Uniform

Commercial Code, and displaced uniform state law by announcing a contrary federal rule for determining title. Under uniform state law, respondent is *not* "entitled under the document," CAL. COM. CODE § 7403(1); U.C.C. § 7-403(1), i.e. under petitioner's negotiable bill of lading, because the bill is made to the order of Reveal, not to respondent, and was not indorsed by Reveal. *See* CAL. COM. CODE § 7501(1); U.C.C. § 7-501(1).

Instead of applying these controlling rules of uniform state law, the Ninth Circuit asserted: "[I]t does not matter that Lite-On was not a holder in due course of a bill of lading that had been endorsed by Reveal, as Burlington argues it must have been in order to be able to sue on the bill." *Lite-On, supra,* 255 F.3d at 1195; Pet. App. at 11. Concluding that a main purpose of the bill's "surrender-upon-delivery clause was to *prevent* the bill of lading from getting into the hands of an insolvent buyer such as Reveal," *id.* at 1195; Pet. App. at 11 (original emphasis), the Ninth Circuit rejected the application of uniform state commercial law, and announced a federal rule which it fashioned, in part, from the Second Circuit's *Allied Chemical* decision.

Allied Chemical, supra, 775 F.2d 476, is inapposite because it concerned – as this case does not – a documentary sale, a letter-of-credit transaction. In that case, the Second Circuit held the carrier liable for delivering goods to the consignee without requiring surrender of the original bill of lading duly indorsed. The Ninth Circuit did not remark the pivotal difference between the sales transactions in *Allied Chemical* and this case. The sale of goods in *Allied Chemical* was a *documentary* sale – i.e. a letter-of-

credit sale, subject to Article 5 of the Uniform Commercial Code; a sale requiring payment *in exchange for delivery*. *See Allied Chemical*, 775 F.2d at 481-82. In this case, however, there was no documentary sale; Silitek did not cause the bill to be made to the order of a bank so as to ensure payment before release of the goods, as the seller did in *Allied Chemical*. Instead, Silitek instructed petitioner to make the bill to the order of Reveal, because – as Silitek's sales invoice reflects – the payment term was on account/ninety days.

Further, the bank, as the order party in *Allied Chemical*, did not indorse the Lloyd Brasiliero bill of lading. As a result, title never passed to the buyer. Thus, the carrier – consistent with uniform state law – was liable for delivering the goods to the buyer because the buyer was a person *not* entitled under the document. In this case, title passed to the buyer, Reveal, when petitioner received the goods from the seller, Silitek, in Taiwan, as shown by the "F.O.B. Taiwan" delivery term in Silitek's invoice. According to the Uniform Commercial Code and *Black's Law Dictionary*, as the Ninth Circuit conceded, the F.O.B. Taiwan term "would mean that title to the keyboards transferred to Reveal when Silitek delivered the keyboards to Burlington in Taiwan." *Lite-On*, 255 F.3d at 1193; Pet. App. at 6 (citing U.C.C. § 2-319(1); BLACK'S LAW DICTIONARY 578 (5th ed. 1979)).

The Ninth Circuit acknowledged that the "F.O.B. Taiwan" delivery term indicated that Silitek had transferred title to the goods on delivering them to petitioner in Taiwan, *see id.* at 1193; Pet. App. at 6, but the court refused to recognize the effect of that transfer of title under California Uniform Commercial Code § 2319(1).

Instead, the Ninth Circuit relied on its *C-Art* decision for the proposition that when the terms of a bill of lading conflict with the terms of the underlying sales contract, the bill of lading terms will govern. *See Lite-On*, 255 F.3d at 1194-95; Pet. App. at 10-11 (citing *C-Art, supra*, 940 F.2d at 553). Although petitioner's bill of lading – the document of title to the goods – was made to the order of Reveal, the Ninth Circuit did not explain why it felt there was a conflict between the bill and the F.O.B. Taiwan term, which, as the court acknowledged, effected transfer of title to Reveal. Declining to adhere to the California statute, the Ninth Circuit held that Silitek was still entitled to the goods under the rule of *C-Art*.

Under *Erie*, the Ninth Circuit's displacement of state law with a federal rule of decision for a commercial dispute is unconstitutional. Respondent founded this action on the federal commerce jurisdiction, 28 U.S.C. § 1337(a). But Congress has never regulated negotiable documents of title, and "[t]here is," as *Erie* explains, "no federal general common law." *Erie, supra*, 304 U.S. at 79.

As the Fifth Circuit has observed, "The federalism concern of *Erie* is applicable to every federal tribunal when federal substantive law has not expressly or impliedly displaced the state substantive law on the particular question for decision." *Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 645 F.2d 360, 384 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). It was, thus, unconstitutional for the Ninth Circuit to fashion a federal rule to replace the provisions of California's Uniform Commercial Code.

The Ninth Circuit's decision below suffers from the same constitutional defect as its decision in *O'Melveny & Myers v. FDIC*, 969 F.2d 744 (9th Cir. 1992), *rev'd*, 512 U.S. 79 (1994). In *O'Melveny* the Ninth Circuit held that, although the FDIC was asserting causes of action created by California law, a federal common-law rule and not California law would apply to determine whether the knowledge of corporate officers acting against a corporation's interest would be imputed to the corporation. *See* 512 U.S. at 83. This Court unanimously reversed the Ninth Circuit's application, in *O'Melveny*, of a federal rule of decision, "as it is so plainly wrong. 'There is no federal general common law.' " *Id.* (quoting *Erie*, *supra*, 304 U.S. at 78). This Court decided that California state law must govern the imputation of corporate officers' knowledge when the FDIC asserts state-law causes of action in its capacity as a corporation's receiver. *See O'Melveny*, 512 U.S. at 83-85. As Justice Stevens explained in a concurring opinion:

> Federal courts, . . . "unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981). Because state law provides the basis for respondent FDIC's claim, that law also governs both the elements of the cause of action and its defenses. Unless Congress has otherwise directed, the federal court's task is merely to interpret and apply the relevant rules of state law.

O'Melveny, 512 U.S. at 90 (Stevens, J., joined by Blackmun, O'Connor, & Souter, JJ., concurring).

As with the FDIC's claim in *O'Melveny*, state law provides the basis for respondent's claim here, and governs both the elements of the cause of action and its defenses. Respondent claimed title to goods covered by a document of title – petitioner's negotiable bill of lading. California's Uniform Commercial Code provides the basis for any claim of title to goods covered by a document of title, and governs the elements of proof necessary to establish such a claim and any defenses to it. By fashioning a federal rule of decision to supplant the California statute, the Ninth Circuit impermissibly created federal common law in violation of the principle this Court set forth in *Erie* and enforced by reversing the Ninth Circuit's decision in *O'Melveny*. Rejecting petitioner's appeal seeking to apply California law, the Ninth Circuit created a federal rule of decision, in contravention of *Erie*'s express injunction.

Except in the Ninth Circuit, the rule of *Erie* has not dimmed with time. In the 1998 Term, this Court applied it in *Alden v. Maine*: "As we explained in *Erie R. Co. v. Tompkins*, 304 U.S. 68 (1938):

> The Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States – *independence in their legislative and independence in their judicial departments*. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence. *Id.* at 78-79."

Alden v. Maine, 527 U.S. 706, 754 (1999) (quoting *Erie*, *supra*, 304 U.S. at 78-79) (emphasis added).

A recent dissenting opinion summarizes the law as follows:

> [E]ver since the watershed case of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court has rejected the notion that it can create a federal common law to fill in great silences left by Congress, and thereby pre-empt state law. We have recognized that "a federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress." *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981).

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 615 (1997) (Thomas, J., joined by Scalia, J., & Rehnquist, C.J., dissenting).

In the 1996 Term, this Court explained the limited circumstances in which a federal court might permissibly create a federal rule of decision despite the existence of state law on the question:

> "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). Nor does the existence of related federal statutes automatically show that Congress intended courts to create federal common-law rules, for " 'Congress acts . . . against the background of the total *corpus juris* of the states. . . . ' " *Id.*, at 68 (quoting H. Hart & H. Wechsler, The Federal Courts and the Federal System 435 (1953)). Thus, normally, when courts

> decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." 384 U.S. at 68. Indeed, such a "conflict" is normally a "precondition." *O'Melveny, supra,* at 87. See also *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98 (1991).

Atherton v. FDIC, 519 U.S. 213, 218-19 (1997).

The Ninth Circuit's decision infringes this "guiding principle," by failing to show any conflict between uniform state law and some federal policy or interest which would warrant the appellate court's resort to a federal rule of decision. On grounds of federalism and comity, and because it directly conflicts with the rule of *Erie*, the Ninth Circuit's decision below should be reversed.

II. If Federal Law Does Not Govern the Question of Who Is Entitled Under a Document of Title, There Is No Subject-Matter Jurisdiction and the Judgment Should Be Vacated.

Respondent's complaint asserted that the district court had original jurisdiction of its claim under petitioner's bill of lading by virtue of the provisions of 28 U.S.C. § 1337.

The jurisdiction specified in section 1337 arises "under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. . . . " *Id.* § 1337(a). Neither the judgment of the district court nor the Ninth Circuit's affirming opinion cites to any act of Congress as the basis for the

judgment or as the source of the remedy. The district court merely notes that respondent alleged misdelivery under the Carmack Amendment. *See* Pet. App. at 17 ¶ 1. As noted above, at page 9, the Carmack Amendment does not apply. *See* 49 U.S.C. § 13501. The district court based its judgment, and the Ninth Circuit based its affirmance, on the Ninth Circuit's decision in *C-Art, supra,* 940 F.2d 530, on this Court's decision in *Pere Marquette, supra,* 254 U.S. 538, and on the Second Circuit's decision in *Allied Chemical, supra,* 775 F.2d 476.

The Ninth Circuit felt that these federal cases furnished the applicable rule of decision. It thus refused to apply the California statute governing documents of title, and provided no *ratio decidendi* for fashioning a federal rule of decision where the question of respondent's entitlement under the document was expressly the subject of California statutory law. The Ninth Circuit denied the petition for rehearing and denied the suggestion for rehearing en banc without explaining why it need not adhere to this Court's rule in *Erie, supra,* 364 U.S. at 79, or consider the Fifth Circuit's admonition that "[t]he federalism concern of *Erie* is applicable to every federal tribunal when federal substantive law has not expressly or impliedly displaced the state substantive law on the particular question for decision." *Pennzoil, supra,* 645 F.2d at 384.

Since it based its decision on federal cases, it is apparent that the Ninth Circuit believes that federal substantive law has expressly or impliedly displaced the state substantive law – not only in California but, logically, in every state jurisdiction – on the particular question of who is entitled to goods under a document of title.

But if the federal substantive law is not embodied in an act of Congress, on what basis may the Ninth Circuit conclude that federal law has displaced the states' enactments of Article 7 of the Uniform Commercial Code? "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

In *Atherton, supra*, this Court wrote that " '[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts." 519 U.S. at 218 (quoting *Wallis, supra*, 384 U.S. at 68). The Ninth Circuit below cited no decision of Congress, no federal statute that even colorably preempts the uniform commercial law of the fifty states. Citing various decisions of its own and of other courts, the Ninth Circuit instead created a federal rule of decision to displace the governing California statute.

As discussed in section I above, this decision puts the Ninth Circuit at odds with this Court's concern for federalism and comity, and conflicts with the principles of *Erie*. But separate and apart from this unconstitutional displacement of state substantive law, the absence of a governing federal statute suggests that the Ninth Circuit lacked subject-matter jurisdiction under 28 U.S.C. § 1337. Absent a federal statute, the only arguable basis of jurisdiction under 28 U.S.C. § 1331 would be the "dormant"

commerce clause. As there is no act of Congress regulating entitlement to goods under documents of title, the judgment can stand only if subject-matter jurisdiction is founded on what this Court has termed the "dormant" or "negative" commerce clause. "There is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

Through the years, this Court has struck down a number of state statutes under the dormant commerce clause. But this Court has never held that any state's enactment of Article 7 of the Uniform Commercial Code is violative of the Constitution. As respondent's claim is subject to the provisions of California's enactment of Article 7, the commerce clause – triggering application of 28 U.S.C. § 1331 – would be a federal court's only possible source of jurisdiction to adjudicate respondent's claim.

Petitioner submits that the commerce clause does not apply; that the Constitution – and hence 28 U.S.C. § 1331 – does not confer jurisdiction over respondent's claim; and that the lower courts lacked subject-matter jurisdiction. In the absence of an act of Congress or a provision of the Constitution which delegates authority to the federal courts to decide entitlement to property under documents of title, the Ninth Circuit and the district court had no subject-matter jurisdiction. This Court should, therefore, vacate the judgment with instructions to dismiss the complaint for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LITE-ON PERIPHERALS, INC.,
a Corporation,

Plaintiff-Appellee,

v.

BURLINGTON AIRE EXPRESS, INC.,
a Corporation, dba Burlington
Ocean Services,

Defendant-Appellant,

and

DOES 1 THROUGH 10, inclusive,

Defendant.

No. 99-57003

D.C. No.
CV-98-07709-JSL

OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted, Pasadena, California
June 6, 2001 – Pasadena, California
Filed July 10, 2001

Before: Procter Hug, Jr., Stephen S. Trott, and
William A. Fletcher, Circuit Judges.

Opinion by Judge Trott

COUNSEL

Kathleen C. Jeffries, Russell, Hancock, Jeffries & Gaston LLP, Pasadena, California, for the appellee.

Michael W. Lodwick, Haight, Brown & Bonesteel, LLP, Santa Ana, California, for the appellant.

OPINION

TROTT, Circuit Judge:

In this case we must decide whether a consignor of goods named in a bill of lading has standing to sue the carrier for misdelivery of goods and breach of contract where there is evidence that the consignee, and not the consignor, entered into the shipment contract with the carrier. We answer this question affirmatively, and hold that, in this situation, the consignor of goods was a party to the contract evidenced by the bill of lading with full rights to enforce it. Accordingly, we affirm the district court's decision granting summary judgment in favor of the plaintiff.

FACTS

The parties in this case are Lite-On Peripherals, Inc. ("Lite-On") and Burlington Air Express, Inc. ("Burlington"). Lite-On sued Burlington for breach of contract and misdelivery of goods, alleging that Burlington had violated the terms of its own bill of lading by failing to obtain an endorsed copy of the bill before delivering goods to the buyer, Reveal Computer Products ("Reveal"). Because Reveal turned out to be insolvent, Burlington's failure to obtain a copy of the bill resulted in a loss of over $100,000 to Lite-On.

Lite-On's involvement with this case stems from its relationship with the Silitek Corporation, a Taiwanese

exporter of computer products. Lite-On is a subsidiary of Silitek, and is the assignee of Silitek's rights under the bill of lading that is the center of this dispute. The defendant, Burlington, is a company engaged in the business of transporting goods overseas. Reveal Computer Products is a computer manufacturing company located in California and is not a party to the case.

On January 22, 1996, Burlington received in Keelung, Taiwan, a shipment of 1,000 cartons of computer keyboards from Silitek. Silitek gave Burlington an invoice and a packing list that indicated that the keyboards were to be shipped to Reveal at its offices in California. Burlington, in turn, issued Silitek a document entitled a "Negotiable Combined Transport Bill of Lading." This bill of lading listed Silitek as the consignor of the keyboards. The goods were consigned to the order of Reveal, and listed "LPI" as a "notify party" along with Reveal. Although "LPI" was meant to refer to Lite-On, the bill of lading did not indicate this, nor did it list any address or contact information for LPI. The following language also appeared on the face of the bill: "One of these Combined Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods."

Although the bill of lading indicated that the keyboards were to be delivered to Reveal, Lite-On claims that Reveal was not in fact the intended consignee, but that Lite-On was. Lite-On claims that the goods were *ultimately* intended for Reveal, but that Lite-On was to receive them first and deliver them to Reveal only when Lite-On, on behalf of Silitek, was satisfied with Reveal's creditworthiness. Lite-On discovered the mistake when it received the bill of lading from Silitek. On January 29,

1996, as soon as the error was recognized, Lite-On claims that one of its employees telephoned Burlington and instructed it not to deliver the goods to Reveal. Lite-On also claims that on February 2, 1996, it sent Burlington a facsimile letter again instructing Burlington not to deliver the goods to Reveal. Burlington, however, claims to have no record of either the telephone call or the fax.

Burlington delivered the keyboards to Reveal. Reveal, however, did not give Burlington a copy of the bill of lading that was supposed to be obtained in exchange for the goods. In fact, Reveal has never had the bill, which has at all times been in either Silitek's or Lite-On's possession.

Lite-On was able to recover approximately half of the keyboards mistakenly delivered to Reveal. The unrecovered keyboards, however, were worth $101,602.80. Reveal has not paid Lite-On or Silitek for the keyboards it did receive, and has filed for bankruptcy. Silitek has now assigned to Lite-On all rights it possessed under the bill of lading.

After attempting unsuccessfully to obtain payment from Burlington for the misdelivered keyboards, Lite-On filed suit in federal district court. Lite-On alleged a claim for breach of contract, specifically, breach of the clause in Burlington's bill of lading that indicated that the keyboards would not be delivered without surrender of a duly endorsed bill. The complaint also included causes of action for misdelivery of cargo and negligence. After the parties had conducted informal discovery as ordered, the district judge entered summary judgment in favor of Lite-On. Burlington now appeals.

DISCUSSION

We review *de novo* a district court's decision to grant summary judgment. *See, e.g., Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc). Making all inferences in favor of the non-moving party, we must determine whether material issues of fact exist that would necessitate a trial. *Id.* In this case, summary judgment in favor of Lite-On was appropriate.

Lite-On contends that this is a straightforward contract case. We agree. Lite-On is the assignee of Silitek's rights under the bill of lading, and is therefore able to enforce that contract as Silitek would. The bill of lading, which Burlington itself issued, contained a "surrender-upon-delivery" clause indicating that the keyboards would not be turned over to the named consignee, Reveal, unless the consignee produced an endorsed bill of lading. Despite this language, Burlington gave the goods to Reveal without first requiring Reveal to produce the bill. Burlington admits these essential facts, which are the only facts necessary to establish liability under the bill of lading. *See, e.g., Pere Marquette Ry. Co. v. J.F. French & Co.*, 254 U.S. 538, 546-47 (1921) (failure to require surrender of endorsed bill of lading before delivery of goods when bill of lading so requires is actionable misconduct on the part of the carrier); *C-Art Ltd. v. Hong Kong Islands Line America*, 940 F.2d 530, 532-33 (9th Cir. 1991) (same). Burlington, however, raises numerous issues as to why this case is not so simple. We address these arguments below.

A. Silitek Was a Party to the Bill of Lading Contract, and Lite-On, as Silitek's Assignee, Has Standing to Enforce it.

Burlington's arguments boil down to the central assertion that Silitek was a stranger to the shipping contract evidenced by the bill of lading, and that therefore, neither Silitek nor Lite-On has standing to enforce the surrender upon delivery clause. This argument fails, and once this card is pulled out, Burlington's whole house falls down.

Burlington bases its argument that Silitek was a stranger to the bill of lading on the following contentions and facts. First, it argues that Reveal, and not Silitek, arranged to have Burlington ship the keyboards from Taiwan to California. To support this contention, Burlington points to a pre-existing "Rate and Service Agreement" between it and Reveal, in which Reveal agreed to use Burlington for all its shipping needs.

Burlington also claims that Reveal paid the freight charges for the shipment of keyboards. It points out that the invoice provided by Silitek to Burlington contained the notation "F.O.B. Taiwan." Burlington argues that this notation means that Silitek was responsible for getting the keyboards to Burlington, but that Reveal would actually be responsible for Burlington's freight charges for the transportation to the United States. Burlington claims, not without some support, that the term "F. O.B. Taiwan" would mean that title to the keyboards transferred to Reveal when Silitek delivered the keyboards to Burlington in Taiwan. *See, e. g.*, U.C.C. § 2-319(1); Black's Law Dictionary 578 (5th ed. 1979). Burlington argues that

these facts and propositions demonstrate that Silitek was a stranger to the shipping contract, and that therefore Lite-On is an interloper in no position to bring this lawsuit.

Burlington's analysis misses the point. We assume for the sake of argument that Reveal made the arrangements to have Burlington ship the keyboards, that Reveal was responsible for the freight charges, and that the "F.O.B. Taiwan" notation would mean that title to the goods had theoretically passed to Reveal. Even if all these claims were true, none of them would mean that Silitek was a stranger to the shipping contract.

First, Burlington's claim that Silitek had nothing to do with the shipping contract is factually insupportable. The undisputed facts of this case demonstrate that Silitek *was* involved with the transaction that produced the bill of lading, despite Burlington's contentions to the contrary. As Burlington admits, Silitek was the party that gave it the invoices indicating what goods were to be shipped and to whom. Burlington incorporated the information on these invoices into the bill of lading. And Burlington *gave Silitek the bill of lading* when Silitek delivered the keyboards to Burlington in Taiwan. In contrast, Burlington never gave a copy of the bill to Reveal.

Silitek is also listed as the "consignor" of the goods on the face of the bill of lading. The fine print on the reverse of the bill indicates that a consignor is a party to the shipping contract evidenced by the bill. It indicates that the bill of lading is a contract between the "Carrier" and the "Merchant," and spells out various rights and

duties of those parties. The bill of lading defines "Merchant" as including several parties, namely, "the Shipper, *the Consignor*, the Consignee, the Holder of the Bill of Lading, the Receiver and the *Owner of the Goods*." (emphases added). The bill also lists certain duties specific to the Consignor; for example, it must indemnify the Carrier for all losses resulting from its own inaccurate description of goods. Thus, Burlington's own bill of lading expressly contemplates that the consignor is a party to the shipping contract. This fact forecloses any argument by Burlington that Silitek and Lite-On have no standing to enforce the provisions of the bill.

We have held in a similar case that where a seller of goods is included within the definition of "Merchant" under a bill of lading, a vessel owner cannot claim that the seller is not entitled to enforce the bill. *See All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1431-32 (9th Cir. 1993). In *All Pacific*, we observed that "because the [faces of the] bills of lading do not name any particular parties as Merchants, we must rely on the contract definition of Merchant on the reverse of the bills of lading." *Id.* at 1432. We noted that the definition of "Merchant" on the reverse of the bill of lading:

> unambiguously provides that the cargo owner has obligations under the bills of lading. The provision anticipates that the various parties defined as Merchants would be jointly and severally liable for freight charges. By defining Merchant broadly, the bills of lading attempt to create a broad range of parties from whom the carrier can seek payment for the shipment.

Id. The reasoning from *All Pacific* is applicable to this case. Burlington cannot seek to include a broad range of parties within the contract's definition of "Merchant," and then claim that one of those parties has no standing to enforce the surrender-upon-delivery clause.

Moreover, numerous cases have noted that a bill of lading is the basic shipping contract between a seller and carrier of goods. *See, e.g., Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982) (stating that "[t]he bill of lading is the basic transportation contract between the shipper-consignor and the carrier.") *citing Texas & Pacific Ry. Co. v. Leatherwood*, 250 U.S. 478, 481 (1919); *C-Art*, 940 F.2d at 532. Burlington correctly points out that these cases do not hold that a consignor is a party to the shipping contract *as a matter of law*, even where the arrangements for shipment may have been made by the buyer or consignee. However, as discussed above, the proposition that Silitek was a stranger to the shipping contract cannot be supported. Bills of lading, after all, are designed to prevent sellers of goods from losing money when distant or unfamiliar buyers turn out to be insolvent. In *Allied Chem. Int'l. Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2d Cir. 1985), the Second Circuit noted that:

> The documentary sale [evidenced by a bill of lading] *enables the distant seller to protect himself from an insolvent or fraudulent foreign buyer by ensuring that the buyer ordinarily cannot take possession of the goods until he has paid for them* . . . Absent a valid agreement to the contrary the carrier, the issuer of the bill of lading, is responsible for releasing the cargo only to the party who presents the original bill of lading . . . . If

> the carrier delivers the goods to one other than the authorized holder of the bill of lading, the carrier is liable for misdelivery.

Allied Chemical, 775 F.2d at 481 (emphasis added).

This case illustrates why surrender-upon-delivery clauses are necessary to protect a consignor's interest in shipped goods. Silitek had not been paid when it delivered the keyboards to Burlington, and it was not yet sure that Reveal, its ultimate customer, was creditworthy. The idea that Silitek would send Reveal goods for which it had not been paid, with no guarantee that it would receive payment, simply does not hold water. Until Silitek obtained payment, its interests depended on Burlington's performance of its promise to deliver the goods only upon surrender of the bill of lading. Thus, we reject Burlington's claim that Silitek was a stranger to the shipping contract.

B. Burlington's Argument That an "F.O.B. Place of Origin" Provision Can Alter a Carrier's Liability Fails.

Burlington's argument that Silitek was not a party to the contract is closely tied to its argument that the "F.O.B. Taiwan" provision in the bill of lading absolves it of liability. In *C-Art*, we rejected an argument nearly identical to Burlington's. In that case, the defendant-carrier argued that the fact that goods were shipped F.O.B. Hong Kong, the place of origin, indicated that the insolvent consignee had taken title to the goods, and that therefore the consignor could not claim that the goods had been misdelivered. *See C-Art*, 940 F.2d at 553. The bill of lading at issue in *C-Art* also had a "surrender upon delivery"

clause like the one in this case. We held that the defendant's arguments were:

> inimical to the express provisions of the bill of lading, as well as contradictory applicable authorities [which hold that possession of the original bill of lading conveys title and entitles the holder to the goods]. . . . Although the goods were shipped "F.O.B. Hong Kong," with [the consignee] bearing the risk of loss . . . it is undisputed that [the consignee] never paid C-ART for the goods. In this case, therefore, the bill of lading controls.

Id. Burlington's argument that the "F.O.B. Taiwan" provision in the bill of lading cuts off Silitek's rights under that contract therefore fails.

C. Burlington's Remaining Arguments Fail.

Once it is established that Lite-On, through Silitek, was a party to the shipping contract with standing to enforce the provisions of the bill of lading, Burlington's remaining arguments are easily dispatched.

First, it does not matter that Lite-On was not a holder in due course of a bill of lading that had been endorsed by Reveal, as Burlington argues it must have been in order to be able to sue on the bill. As discussed above, one of the purposes of the surrender-upon-delivery clause was to *prevent* the bill of lading from getting into the hands of an insolvent buyer such as Reveal. Therefore, it makes little sense to argue that a consignor cannot sue a carrier for misdelivery because the consignee – who should never have received the goods or the bill in the first place – has not endorsed the bill.

Burlington also argues that the district court ignored certain factual issues in granting Lite-On summary judgment. Specifically, it argues that a factual issue exists as to whether Burlington received Lite-On's phone call and faxed warning that Reveal was not to receive the shipment of keyboards. Burlington also argues that there are issues of fact remaining as to whether it or Silitek was at fault for the mistaken designation of Reveal as the consignee. While Burlington is correct that these issues represent genuine factual disputes, they are not material ones. Lite-On's breach of contract action would remain intact even if it had never attempted to warn Burlington not to deliver the keyboards to Reveal. Burlington's contractual liability would also remain intact whether or not the mistake in designating Reveal as the consignee was attributable to Silitek. If Burlington had abided by its own surrender-upon-delivery clause, the mistake would not have resulted in a loss of over $100,000 to Lite-On. The bill of lading specifically said that Burlington would not deliver the goods to *any* consignee – be it Reveal or Lite-On – without obtaining an endorsed bill of lading, and it breached this provision.

Burlington's remaining arguments are similarly misplaced. It is irrelevant whether Burlington would have been required to honor an order to stop delivery from Lite-On. The bill of lading specifically stated that the goods could not be delivered unless the buyer produced an endorsed bill, and Burlington disregarded this provision. Finally, whether Lite-On would have had an option to reclaim the goods from Reveal under section 2-702 (2) of the Uniform Commercial Code is likewise irrelevant. That a remedy against Reveal may have existed under the

U.C.C. or California's equivalent has no bearing on the issue of whether Burlington was liable for a breach of its own contract.

For the foregoing reasons, summary judgment in favor of Lite-On was appropriate. The judgment of the district court is therefore AFFIRMED.

APPENDIX B

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FILED
NOV 30 1999

ENTERED
DEC – 1 1999

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LITE-ON PERIPHERALS, INC., a corporation, Plaintiff, v. BURLINGTON AIR EXPRESS, INC., a corporation doing business as BURLINGTON OCEAN SERVICES; and DOES 1 through 20, inclusive, Defendants.	Case No. CV-98-7709 JSL(CTx) [~~PROPOSED~~] JUDGMENT Pretrial Conference Date: November ~~24~~ 29, 1999 Time; ~~9:00 a.m.~~ 1:00 PM Place: Courtroom 4 Trial Date: December 14, 1999

The motion of plaintiff Lite-On Peripherals, Inc. ("Lite-On") for summary judgment in its favor and against defendant BAX Global, Inc., formerly known as Burlington Air Express, Inc., came on for hearing before the Court on November ~~24~~ 29, 1999 at ~~9:00 a.m.~~ 1:00 pm, the Honorable J. Spencer Letts presiding. Lite-On appeared through its attorneys, Russell, Hancock, Jeffries & Gaston LLP by Kathleen C. Jeffries. Burlington

appeared through its attorneys, Porter, Groff & Lodwick by _____.

The Court has considered all evidence presented by the parties on said motion and made its statement of uncontroverted facts and conclusions of law.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED that plaintiff Lite-On Peripherals, Inc. shall recover from defendant BAX Global, Inc., formerly known as Burlington Air Express, Inc., the sum of $101,602.80 plus interest thereon from February 6, 1996 in ~~the sum of $_____~~ as provided by law and costs of suit ~~in the sum of~~ [SL] $_____.

Dated: 11/30, 1999

/s/ Sp Letts
The Honorable J. Spencer Letts
United States District Judge

APPENDIX C

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FILED
NOV 30 1999

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LITE-ON PERIPHERALS, INC., a corporation, Plaintiff, v. BURLINGTON AIR EXPRESS, INC., a corporation doing business as BURLINGTON OCEAN SERVICES; and DOES 1 though 20, inclusive, Defendants.	Case No. CV-98-7709 JSL(CTx) PLAINTIFF LITE-ON PERIPHERALS, INC.'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (Local Rule 13.5) Trial Date: December 14, 1999 Time: 9:00 a.m. Place: Courtroom 4

Plaintiff Lite-On Peripherals, Inc. ("Lite-On") hereby submits its proposed findings of fact and conclusons of law as required by Local Rule 13.5:

ENTERED
DEC 1 1999

FINDINGS OF FACT

1. By its complaint, Lite-On has alleged four causes of action against Burlington, to wit, misdelivery under the Carmack Amendment to the Interstate Commerce Act, negligence, breach of written contract and conversion.

2. At all material times, Lite-On has been and now is a California-based corporation engaged in the computer hardware business.

3. At all such times, Lite-On's parent company has been and now is Silitek Corporation ("Silitek"), a Taiwan-based corporation.

4. On or about January 22, 1996 BAX Global, Inc., formerly known as Burlington Air Express, Inc., ("defendant" or "Burlington") received 1,000 cartons comprised of 5,000 computer keyboards from Silitek in Keelung, Taiwan for transportation to Los Angeles, California.

5. In connection with its receipt of said goods, Burlington issued a bill of lading in the form of its own negotiable combined transport bill of lading.

6. Pursuant to the terms of said bill, the goods were "consigned to order of" Reveal Computer Products, Inc. ("Reveal") in Chatsworth, California and were to be delivered to Reveal only upon surrender of a duly endorsed copy of said bill.

7. Specifically, the surrender language on the face of Burlington's bill read:

> "One of these Combined Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods."

8. Despite the presence of such provision on the face of its bill, Burlington delivered the computer keyboards to Reveal without obtaining a copy of the bill, endorsed or otherwise.

9. In fact, the bill was in the hands of Lite-On, Silitek's assignee for purposes of this case, at the time the goods were delivered to Reveal; and remains in Lite-On's possession today.

10. Furthermore, Burlington was put on notice through the type-written portions of its own bill of lading that Lite-On was to have been notified before delivery to Reveal was attempted. Burlington made no efforts to notify Lite-On.

11. However, Lite-On, prior to delivery, notified Burlington by telephone on January 29, 1996 and faxed letter on February 2, 1996 that the delivery to Reveal was not to have been made, for Reveal's creditworthiness was then in question and the original bill of lading was in Lite-On's possession.

12. Notwithstanding such warning from Lite-On or the terms of its own bill of lading, Burlington delivered the entire shipment to Reveal on or about February 6, 1996.

13. Lite-On was eventually able to recover 2,495 of the 5,000 keyboards from Reveal. However, 2,505 of the items were never recovered.

14. The original invoice prepared by Silitek for the keyboards comprising the entire shipment was issued for the account of Lite-On on January 19, 1996, prior to receipt of the shipment by Burlington, and reflected the

total price for all 5,000 pieces contained in the 1,000 cartons of $202,800.00.

15. As anticipated, Reveal failed to pay Silitek or Lite-On for the misdelivered computer keyboards and subsequently filed bankruptcy.

16. Based upon such invoice, the value of the 2,505 keyboards improperly delivered to Reveal and unrecoverable by Lite-On was $101,602.80.

CONCLUSION OF LAW

1. The assignee of an assignable chose in action takes legal title and may sue in his own name even without a beneficial interest. 4 Witkin, Cal. Procedure (9th ed. 1997) Pleadings, §§108-109, pp. 168-169.

2. Here, as the assignee of Silitek, the party those contract rights under Burlington's bill of lading were breached by Burlington, Lite-On is authorized to pursue recovery for Burlington's wrong.

3. Where a carrier is obligated by its bill of lading terms, as Burlington was in this case, to obtain the bill before delivering the goods, failure to do so constitutes actionable misconduct. See, for example, *Pere Marquette Railway Co. v. J.F. French & Co.*, 254 U.S. 538, 65 L.Ed. 391, 41 S.Ct. 195 (1921) (conversion); *C-Art, Ltd. v. Hong Kong Island Line America*, 940 F.2d 530 (9th Cir. 1991) (misdelivery); *Allied Chemical International Corp. v. Companhia*, 775 F.2d 476 (2d Cir. 1985) (breach of contract and conversion); and *Iowa Beef Processors, Inc. v. Grand Trunk Western Railroad Company*, 493 F.2d 665 (6th Cir. 1974) (misdelivery and conversion).

4. Furthermore, where bills of lading contain language requiring surrender of the bill prior to delivery of the goods, "[a]ny interpretation of the bill of lading, other than one requiring the surrender of a duly endorsed original bill of lading in exchange for the goods, would require this Court to contradict the language of the contract and render this language of the bill of no affect [sic]. Such an interpretation strains credulity." *International Knitwear Company Limited v. M/V Zim Canada,* 1994 WL 924203 (S.D.N.Y. 1994).

5. The language in Burlington's own bill requiring surrender of the endorsed bill before delivery is clear. There exists no reason for this Court to disregard such language or to look beyond the bill to determine the rights and liabilities of the parties.

6. Burlington's argument that, because the goods were shipped F.O.B. point of origin, the consignee named in the bill was the owner of the goods and therefore was entitled to delivery without surrender of the bills of lading, is unfounded. Such an assertion has been rejected by the Ninth Circuit in *C-Art v. Hong Kong, supra,* 940 F.2d 530. There the Court stated that "this argument is inimical to the express provisions of the bill of lading, as well as contradictory to the applicable authorities."

7. Based upon the weight of authority, Burlington's delivery of the goods to Reveal without obtaining the endorsed bill of lading constitutes actionable breach of contract, misdelivery and/or conversion.

8. The basic recovery under any of the theories propounded by Lite-On is the value of the property with interest. See, for example, California Civil Code §3336

(conversion); Civil Code §3300 (breach of contract); and *Metetio Sea Food Co. v. Gordons Transport*, 191 S.W. 2d 983 (Mo. App. 1946), among others (misdelivery of cargo).

9. Lite-On is therefore entitled to recover from Burlington the sum of $101,602.80 plus interest and costs of suit.

Dated: November 23, 1999

RUSSELL, HANCOCK, JEFFRIES & GASTON LLP

By: /s/ KATHLEEN C. JEFFRIES
Kathleen C. Jeffries
Attorneys for Plaintiff
LITE-ON PERIPHERALS, INC.

IT IS SO ORDERED 11/30/99

Dated Sp Letts

United States District Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LITE-ON PERIPHERALS, INC., a Corporation, Plaintiff-Appellee v. BURLINGTON AIRE EXPRESS, INC., a Corporation, dba Burlington Ocean Services, Defendant-Appellant, and DOES 1 THROUGH 10, inclusive, Defendant.	[FILED AUG – 1 2001 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS] No. 99-57003 D.C. No. CV98-07709 JSL ORDER

Before: HUG, TROTT, and W. FLETCHER, Circuit Judges.

The Appellee is requested to file a response (50 copies) to Appellant's petition for rehearing and petition for rehearing en banc filed July 24, 2001. The response shall not exceed fifteen (15) pages and shall be filed within fourteen (14) days from the filed date of this Order. The panel is cognizant of the importance of this matter to the transportation industry and hopes that the

parties will keep this in mind in addition to the goal of winning a case.

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LITE-ON PERIPHERALS, INC., a Corporation, Plaintiff-Appellee, v. BURLINGTON AIRE EXPRESS, INC., a Corporation, dba Burlington Ocean Services, Defendant-Appellant and DOES 1 THROUGH 10, inclusive, Defendant.	[FILED AUG 31 2001 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS] No. 99-57003 D.C. No. CV98-07709 JSL ORDER

Before: HUG, TROTT, and W. FLETCHER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing, and to deny the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc, are DENIED.

APPENDIX F

Constitutional and Statutory Provisions Involved

U.S. CONST. art. I, § 8 (in relevant part):

The Congress shall have Power . . .

. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. III, § 2, cl. 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; – between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. amend. X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1337(a):

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however,* That the district courts shall have original jurisdiction of any action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

Cal. U. Com. Code § 1201(6):

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and that, by its terms, evidences the intention of the issuer that the person entitled under the document (Section 7403(4)) has the right to receive, hold, and dispose of the document and the goods it covers. Designation of a document by the issuer as a "bill of lading" is conclusive evidence of that intention. "Bill of lading" includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or

rail transportation, and includes an air consignment note or air waybill.

CAL. U. COM. CODE § 1201(15):

(15) "Document of title" includes a bill of lading, dock warrant, dock receipt, warehouse receipt, gin ticket, or compress receipt, and any other document that, in the regular course of business or financing, is treated as adequately evidencing that the person entitled under the document (Section 7403(4)) has the right to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document shall purport to be issued by a bailee and purport to cover goods in the bailee's possession that either are identified as or are fungible portions of an identified mass.

CAL. U. COM. CODE § 1201(20):

(20) . . . "Holder," with respect to a document of title, means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

CAL. U. COM. CODE § 2401(2):

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading.

CAL. U. COM. CODE § 7104:

Negotiable and nonnegotiable warehouse receipt, bill of lading, or other document of title

(1) A warehouse receipt, bill of lading or other document of title is negotiable

(a) If by its terms the goods are to be delivered to bearer or to the order of a named person; or

(b) Where recognized in overseas trade, if it runs to a named person or assigns.

(2) Any other document is nonnegotiable. A bill of lading in which it is stated that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against a written order signed by the same or another named person.

(3) A nonnegotiable warehouse receipt and a nonnegotiable bill of lading must be conspicuously (Section 1201) marked "nonnegotiable." In case of the bailee's failure to do so, a holder of the document who purchased it for value supposing it to be negotiable may, at his option, treat such document as imposing upon the bailee the same liabilities he would have incurred had the document been negotiable.

CAL. U. COM. CODE § 7403:

Obligation of warehouseman or carrier to deliver; Excuse

(1) The bailee must deliver the goods to a person entitled under the document who complies with subdivisions (2) and (3), unless and to the extent that the bailee establishes any of the following:

(a) Delivery of the goods to a person whose receipt was rightful as against the claimant;

(b) Damage to or delay, loss or destruction of the goods for which the bailee is not liable, but the burden of establishing negligence in case of damage or destruction by fire is on the person entitled under the document;

(c) Previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouseman's lawful termination of storage;

(d) The exercise by a seller of his right to stop delivery pursuant to the provisions of the division on sales (Section 2705);

(e) A diversion, reconsignment or other disposition pursuant to the provisions of this division (Section 7303) or tariff regulating such right;

(f) Release, satisfaction or any other fact affording a personal defense against the claimant;

(g) Any other lawful excuse.

(2) A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests or where the bailee is prohibited by law from delivering the goods until the charges are paid.

(3) Unless the person claiming is one against whom the document confers no right under subdivision (1) of Section 7503, he must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery

thereon or be liable to any person to whom the document is duly negotiated.

(4) "Person entitled under the document" means holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a nonnegotiable document.

CAL. U. COM. CODE § 7501:

Form of negotiation and requirements of "due negotiation"

(1) A negotiable document of title running to the order of a named person is negotiated by his indorsement and delivery. After his indorsement in blank or to bearer any person can negotiate it by delivery alone.

(2)(a) A negotiable document of title is also negotiated by delivery alone when by its original terms it runs to bearer.

(b) When a document running to the order of a named person is delivered to him the effect is the same as if the document had been negotiated.

(3) Negotiation of a negotiable document of title after it has been indorsed to a specified person requires indorsement by the special indorsee as well as delivery.

(4) A negotiable document of title is "duly negotiated" when it is negotiated in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value.

(5) Indorsement of a nonnegotiable document neither makes it negotiable nor adds to the transferee's rights.

(6) The naming in a negotiable bill of a person to be notified of the arrival of the goods does not limit the negotiability of the bill nor constitute notice to a purchaser thereof of any interest of such person in the goods.